Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

BAY VIEW, INC.

Petitioner,

v.

UNITED STATES,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Congress, in legislation enacted at the request of one of the parties to litigation, may retroactively terminate vested property rights in transactions long completed without the United States incurring liability under the Fifth Amendment?

2. Whether the Court of Appeals for the Federal Circuit violated the standards set by this Court in dismissing *on the pleadings* petitioner's fact intensive complaint of a retroactive taking of its property rights by Congress.

3. Whether the Court of Appeals has ignored the plain meaning and Congressional intent of a key provision of the Alaska Native Claims Settlement Act (ANCSA) that requires the Alaskan Regional Corporations to share with each other and then with the village corporations "70 percent of *all* revenues received by each Regional Corporation from the timber resources and sub-surface estate patented to it." 43 U.S.C. § 1606(i) (emphasis added).

4. Whether the decision of the Court of Appeals for the Federal Circuit in depriving over 200 Alaska Villages of their share of revenues from the sale of timber and mineral resources, conflicts with the settled construction of ANCSA, and a similar act, by the Ninth Circuit and the Alaska Federal Court?

CORPORATE DISCLOSURE

Bay View Inc. is a corporation established in accordance with the Alaska Native Claims Settlement Act. It does not have a parent corporation nor is there any publicly held corporation owning 10 percent or more of its stock.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

Bay View, Inc. petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in *Bay View, Inc. v. United States*, 278 F.3d 1259 (Fed. Cir. 2001), *reh'g denied*, 285 F.3d 1035 (Fed. Cir. 2002).

OPINIONS BELOW

The opinion of the United States Court of Federal Claims (App. B) is reported at 46 Fed. Cl. 494 (Fed. Cl. 2000); the majority and dissenting opinions of the United States Court of Appeals for the Federal Circuit (App. A) are reported at 278 F.3d 1259 (Fed. Cir. 2001); the Order of that Court denying a petition for rehearing and the dissenting opinion of four judges of that Court (App. C) are reported at 285 F.3d 1035 (Fed. Cir. 2002).

JURISDICTION

The judgment of the court of appeals (App. A) was issued on December 3, 2001. A timely petition for rehearing was denied on March 26, 2002 (App. C). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> [N]or shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 7(i) of the Alaska Native Claims Settlement Act (hereinafter "ANCSA"), Alaska Native Claims Settlement Act, Pub. L. No. 92-203, § 7, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. § 1606(i)), provides:

> Seventy per centum of all revenues received by each Regional Corporation from the timber resources and subsurface estate patented to it pursuant to this Act shall be divided annually by the Regional Corporation among all twelve Regional Corporations organized pursuant to this section according to the number of Natives enrolled in each region . . . .

Section 7(j) of ANCSA, 43 U.S.C. § 1606(j), provides:

> Not less than 45% of funds from such sources [revenues received by each Regional Corporation from the timber resources and subsurface estate patented to it pursuant to this Act] during the first five-year period, and 50% thereafter, shall be distributed among the Village Corporations in the region.

The 1995 amendment to Section 7(i), Alaska Native Claims Settlement Act, Amendments—Hawaiian Home Lands

Recovery Act, Pub. L. No. 104-42, § 109, 109 Stat. 353, 357 (1995) (codified in part at 43 U.S.C. § 1606), provides:

> For purposes of this subsection, the term "revenues" does not include any benefit received or realized for the use of losses incurred or credits earned by a Regional Corporation.
>
> This amendment shall be effective as of the date of enactment of the Alaska Native Claims Settlement Act, Public Law 92-203 (43 U.S.C. 1601, *et seq.*).

STATEMENT OF THE CASE

This case arises out of a retroactive taking by Congress of vested property rights as part of a deliberate interference with ongoing litigation. Congress "wiped out any claim [Bay View and some 200 Alaska Native villages] might have had" to share in certain revenues. *Bay View v. Ahtna*, 105 F.3d 1281, 1284 (9th Cir. 1997) (Kozinski, J.). But, primarily, it concerns a dangerous failure by the Court of Appeals for the Federal Circuit to protect the villages from Congress' retroactive taking, as required by the Fifth Amendment to the Constitution and precedents of this Court.

1. ANCSA's requirement that all revenues from mineral and timber transactions be shared with native villages.

When adopting the Alaska Native Claims Settlement Act ("ANCSA"), Congress extinguished all aboriginal Native land claims in Alaska in return for the transfer of 40 million acres of land and a cash payment to Native Alaskan entities. The 40 million acres were divided among 12 Regional Native Corporations and some 200 Native Village Corporations. The subsurface estates to all 40 million acres and vast timber resources were conveyed to the Regional Corporations only, but subject to an important condition.

To achieve an equitable division among all Alaska Natives, and to avoid "pockets of poverty" that would have occurred from the uneven location of mineral and timber wealth,[1] Congress in Section 7(i) provided that "70 percent of *all* revenues received by each Regional Corporation from the timber resources and subsurface estate patented to it" had to be shared with the other Regional Corporations. 43 U.S.C. § 1606(i) (emphasis added). Section 7(j) in turn requires each Regional Corporation to share 50 percent of all Section 7(i) revenues with the Village Corporations within its Region. *Id.* § 1606(j).[2] Sections (i) and (j) were not written narrowly merely to require *oil royalties* or *stumpage fees* from timber leases to be shared, but broadly to mandate that 70 percent of "*all revenues*" from these estates be shared. In this way, wealth generated from the oil-rich but lightly populated North Slope Native lands and the vast timber resources in southeastern Alaska would be shared with all other Alaska Native Regional and Village Corporations throughout the State. In return, Congress extinguished all aboriginal titles in Alaska's remaining 335 million acres.

The critical importance of the sharing provision is apparent when it is understood that in earlier versions of ANCSA, the Administration had proposed a statewide Native corporation

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[1] *To Provide for the Settlement of Certain Land Claims of Alaska Natives:* Hearings Before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, 92d Cong. 237 (1971) (hereinafter "House Hearing").

[2] For the first five years, the Regional Corporations were required to share only 45 percent of the 7(i) revenues with the Village Corporations. Subparagraphs (k), (l) and (m) of section 1606 provide that the funds paid to the village corporations shall be computed by the relative number of the shareholders in the village corporations, that the regional corporations may require a village corporation to present a plan for use of the funds (subject to arbitration if there is disagreement), and that "an equitable portion" may be withheld for mutually agreeable region wide projects. 43 U.S.C. § 1606(k), (l) & (m).

to own and exploit all the mineral and timber estates so that all natives would share in all the proceeds of the timber and subsurface estates. *See* House Hearing at 98, 101 & 149-50. In the Conference Report that led to the Act, however, this was changed to 12 Regional Corporations. But the sharing provisions were added as an essential feature to maintain equality despite the different locations of the corporations. In discussing the creation of Regional and Village Corporations, Congress described the sharing principal as insuring "that all Natives may benefit equally from any minerals discovered." H.R. REP. NO. 92-523 (1971), *reprinted in* 1971 U.S.C.C.A.N. 2192, 2196 (1971). Congress, recognizing that the responsibility of administering the sharing provisions now rested with board members of several regional corporations, admonished that "[t]he conference committee anticipates that there will be responsible action by the board members and officers of the corporations *and there will not be any abuses of the intent of this Act.*" H.R. CONF. REP. NO. 92-746 (1971), *reprinted in* 1971 U.S.C.C.A.N. 2247, 2250 (1971) (emphasis added) (hereinafter "Conference Report").

2. ANCSA's attention to the tax status of the shared estates.

Congress in ANCSA was careful to assure that the shared timber and subsurface estates received favorable tax treatment to preserve their full value to the Alaska Natives. The tax treatment was an essential part of the settlement. If ANCSA had not addressed the issue, the tax basis in the resources might have been considered zero, with all subsequent revenues taxed as a gain. But Congress provided in ANCSA that the tax basis for the Section 7(i) resources would be their value at the time the lands were patented to the Regional Corporations, thus minimizing taxes that would have to be paid on sale of the resources. 43 U.S.C. § 1620(c). In 1980, delays in the actual patenting of lands to the Regional Corporations led Congress to amend ANCSA to add

that the tax basis for timber and mineral estates would be either their value at the date of their patent, or their value at the date of their first commercial development, whichever was higher. Act of Dec. 2, 1980, Pub. L. No. 96-487, § 1408, 94 Stat. 2371, 2495-96 (1980) (codified at and amending 43 U.S.C. § 1620(c)). This amendment made the tax status of the timber and mineral estates that much more important as a part of the value of the timber and subsurface estates transferred under ANCSA.

3. Early attempts by the resource rich Regional Corporations to avoid sharing income from the timber and subsurface estates.

When it came to sharing their assets, the Regional Corporations did not behave as Congress intended. Instead, from the beginning, the more resource-rich Regional Corporations repeatedly resisted ANCSA's sharing requirement. In a series of cases, the federal courts rebuffed these efforts to evade ANCSA's mandate, ultimately leading to a judicially approved "Section 7(i) Settlement Agreement." In that Agreement, the Regional Corporations agreed that:

> *[A]ll* revenues (including money, benefits and *any other thing of value*) received by a [Regional] Corporation that are attributable to, directly related to, *or generated from* the exploration, development, production, lease, sale *or other exploitation* of, or *the disposition of any interest in*, the Corporation's Section 7(i) Resources shall be included in Gross Section 7(i) Revenues.

See, e.g., *Aleut Corp. v. Arctic Slope Regional Corp.*, 484 F. Supp. 482, 485 (D. Alaska 1980) ("*Aleut IV*") (emphasis added) (approving a settlement agreement concerning revenues to be shared under Section 7(i)).[3] And, of course,

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[3] We are lodging a copy of the Settlement Agreement with the Clerk.

50 percent of all Section 7(i) revenues received by the Regional Corporations must be shared with the Village Corporations under Section 7(j).

4. The attempt by the resource rich Regional Corporations to avoid sharing income from sales of net operating losses created by sales of timber and minerals at below market prices.

Notwithstanding the 7(i) Settlement Agreement, the resource-rich Regional Corporations undertook a new scheme to avoid ANCSA'S sharing mandate in the late 1980s. Thanks to tax law changes and depressed oil and timber prices, they began to sell off huge quantities of subsurface and timber resources at reduced prices—for the express purpose of generating tax losses (hereinafter "net operating losses" or "NOLs"), that under the tax law then in effect, could be sold at huge profits to third parties which could then use the NOLs to shelter other income. The sale of the NOLs brought hundreds of millions of dollars to the resource rich Regional Corporations, *none of which they shared with one another under Section 7(i) or with the village corporations under Section 7(j).* Although these Regional Corporations shared the small proceeds of the actual sale of the timber or minerals with the other Regions and Villages, the majority of the revenue lay in the simultaneous sale of the NOLs; and *that* value they kept to themselves (Comp. at ¶¶ 13-22).[4] As a result, the Villages not only did not receive a share of the major revenue produced from the sales, contrary to ANCSA's mandate, but forever lost their ability to share in revenues from the nonrenewable timber and mineral resources that had been disposed of and are gone forever.

When the resource rich Regional Corporations began these transactions, a number of them secretly agreed among

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[4] "Comp." refers to Bay View's complaint in the United States Court of Federal Claims.

themselves not to share any of the revenues generated from these NOL sales with either the other regional corporations or with the villages. When the largest resource-*poor* Regional Corporation discovered the agreement and threatened suit, the others quickly bought it off, guaranteeing substantial loans and providing other benefits. The resource rich Regional Corporations also agreed among themselves to seek to have Congress change the law to support what they had done (*see* Comp. at ¶¶ 24-27).

5. Bay View's class action against the Regional Corporations, and Congress' retroactive legislation.

In 1994, Bay View, on behalf of itself and other Village Corporations, sued the Regional Corporations to recover the Villages' share of the NOL revenues. The federal district court, inexplicably, dismissed the suit for lack of standing. *Bay View, Inc. v. Ahtna, Inc.*, No. A94-0551 (D. Alaska, July 7, 1995). While the case was on appeal to the Ninth Circuit, the Regional Corporations—apparently fearing a loss in the Court of Appeals as they had suffered in all their previous schemes to avoid ANCSA's sharing mandate—successfully persuaded Congress to amend Section 7(i), *retroactively*, to exclude from the Act's sharing mandate all NOL revenues, even those generated on long completed transactions. The 1995 amendment—which was tacked on to a bill on another subject and passed without hearings—provides:

> For purposes of this subsection, the term "revenues" does not include any benefit received or realized for the use of losses incurred or credits earned by a Regional Corporation.
>
> This amendment shall be effective as of the date of enactment of the Alaska Native Claims Settlement Act, Public Law 92-203 (43 U.S.C. 1601, *et seq.*).

Alaska Native Claims Settlement Act, Amendments—Hawaiian Home Lands Recovery Act, Pub. L. No. 104-42,

§ 109, 109 Stat. 353, 357 (1995) (codified in part at 43 U.S.C. § 1606).

When Bay View's case against the Regional Corporations reached the Ninth Circuit, that court held that "Congress wiped out any claim [Bay View] might have had to shared NOL revenue" and that "Congress now has taken away whatever rights they may have had." *Bay View v. Ahtna*, 105 F.3d at 1284. As Judge Kozinski held, the issue of taking "will have to be answered by the Court of Federal Claims." *Id.* at 1286.

6. Bay View's suit in the Court of Federal Claims and Court of Appeals for the Federal Circuit.

Bay View then filed this suit against the United States in the Court of Federal Claims for taking its property without payment of just compensation. The Court of Federal Claims dismissed the case on the pleadings, holding:

> The court concludes, on the basis of section 1606(i)'s plain language, that NOL revenues were not shareable revenues under section 1606(i) as enacted . . . . [a]ccordingly, plaintiff had no property interest in the NOL revenues, and Congress took nothing when it enacted the 1995 amendment . . . .

App. B at 20a.

A divided Court of Appeals for the Federal Circuit affirmed. The majority, apparently as a factual conclusion, held that "[t]he sale of the NOLs themselves . . . is a separate business transaction without any direct relationship to the tangible resources patented to the Regional Corporations." App. A at 5a. The Court made no reference to plaintiff's complaint, to material presented in opposition to the motion to dismiss, or to the discussion of NOLs transactions in the decision of the Ninth Circuit that led to the claim. The majority concluded that the 1995 Amendment did not change the law and upheld the dismissal on the pleadings. App. A at 9a.

Judge Newman dissented, citing this Court's decision in *Eastern Enterprises v. Apfel*, 534 U.S. 498 (1998), disfavoring retroactive application of laws and emphasizing the need for factual determinations in cases alleging legislative takings. She also referred to the Alaska District Court and Ninth Circuit decisions interpreting ANCSA's sharing duties broadly, and to the Ninth Circuit's decision in *Peabody Coal v. Navajo Nation*, 75 F.3d 457 (9th Cir. 1996), interpreting "proceeds" in a similar statute to include the sharing of tax revenues from subsurface estates. She concluded that:

> Statute and precedent make quite clear that Bay View had a property right in the full proceeds of the timber sales. The retroactive legislation which deprived Bay View of its share raised a claim cognizable under the Fifth Amendment.

App. A at 13a.

On petition for rehearing with suggestion of rehearing *en banc*, the Court of Appeals affirmed without opinion. Judge Gajarsa, joined by Judges Newman, Clevenger and Linn, filed a dissenting opinion. They described as "grave error" the majority's "fail[ure] to comprehend that the NOLs are in fact revenues derived from the timber sales." App. C at 32a-33a.

The dissent also notes the broad dictionary definition of "revenues," concluding that the plain meaning of the pre-amendment duty to share "*all revenues*" from the timber and subsurface estates clearly included revenues from NOLs produced by the sale of the timber and subsurface estates. *Id.* at 34a. The dissent concludes that the 1995 amendment was a taking of property. "That claim should have been heard on the merits, not dismissed on pleadings." *Id.* at 35a.

REASONS FOR GRANTING THE PETITION

I. THERE IS A SERIOUS THREAT TO THE JUDICIAL SYSTEM IF CONGRESS IS ALLOWED TO INTERVENE IN ONGOING LITIGATION RETROACTIVELY CHANGING LONG VESTED PROPERTY RIGHTS WITHOUT THE DUTY TO PAY JUST COMPENSATION.

The high-handed actions of the Regional Corporations, using their political muscle to have Congress pass a retroactive law to preempt the Ninth Circuit from hearing the Villages' case, was a disreputable use of influence to override property rights in transactions long completed and to interfere in the judicial process. Where Congress intervenes in private litigation, as it did here, especially by passing retroactive legislation, the Courts should be particularly sensitive to protect the rights of the party whose case was thus ended. If a taking claims can be dismissed on the pleadings in the circumstances of this case, protection of property rights is insecure. But there is even more at stake here. Enforcement of the takings clause, real enforcement, not lip service, not only protects property rights, but also serves as a strong disincentive to Congress from inappropriately intervening in the judicial process. It thus protects the separation of powers and helps preserve an independent judiciary. Absent application of the Fifth Amendment's just compensation' requirement, there will be no limit to litigants going to Congress to change the law to keep from losing lawsuits, thus interfering with the integrity of an independent judiciary. It is one thing to make a law of general application. It is another to make one to decide a pending case one way rather than another. "[O]ne legislative interference is but the first link of a long chain of repetitions." THE FEDERALIST NO. 44 (James Madison).

When an Act of Congress is not only passed at the instance of a litigant, specifically to affect that litigation, but is expressly retroactive, it particularly requires close scrutiny. As Justice O'Connor stated in *Eastern Enterprises*:

> Retroactivity is generally disfavored in the law, in accordance with "fundamental notions of justice" that have been recognized throughout history . . . "[i]t is a principle in the *English* common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect" . . . .

Eastern Enterprises v. Apfel, 524 U.S. 498, 532-33 (1998) (citations omitted).

Because this case concerns a serious interference by Congress with transactions long completed and property rights long vested, and because it affects over 200 villages in Alaska and alters the fundamental sharing principle that made the Alaska Native Claims Settlement Act equitable to natives in all regions, rich or poor, this case is worthy of this Court's review.

II. THE RIGHTS THAT WERE TAKEN WERE VESTED PROPERTY RIGHTS PROTECTED BY THE FIFTH AMENDMENT.

The dissenting panel opinion noted, relying on decisions of this Court:

> For these sales, already completed and proceeds already realized, the villages' right to their statutory share was fully vested. Legislation that retroactively affects vested rights is "not favored in the law." *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988). It violates fundamental concepts of justice and fairness, to change the rules after the game is played.

App. A at 12a.

Bay View's rights were property rights long vested before the 1995 retroactive change in ANCSA. As this Court observed in *Tulsa Collection Services v. Pope*, 485 U.S. 478 (1988), concerning an unsecured claim against an estate "[l]ittle doubt remains that such an intangible interest is property protected by the Fourteenth Amendment." *Id.* at 485. There is even less doubt about a federally created right to share the income in a transaction that has long been completed. *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) ("as has been implicit in our prior decisions . . . the interest of an individual in continued receipt of [federally created] benefits is a statutorily created 'property' interest protected by the Fifth Amendment") (citations omitted); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04 (1984) (a corporation's intangible rights to receive money are protected under the Fifth Amendment). See also *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.), where the Court observed "[i]t is against all reason and justice" to presume that the legislature has been entrusted with the power to enact "a law that takes property from A and gives it to B"—or, as *now* interpreted, without an obligation to pay just compensation.

Congress may have been free to change ANCSA's sharing provisions prospectively (an issue not presented in this case) but it certainly was not free to change the sharing provisions retroactively to eliminate the rights of the villages to share in money from transactions long completed, without payment of just compensation. As the Court explained in *Eastern Enterprises*, the Taking Clause provides a "safeguard against retrospective legislation concerning property rights." 524 U.S. at 534.

III. THE COURT OF APPEALS FLAGRANTLY VIOLATED THE STANDARDS OF THIS COURT FOR DISMISSING A LEGISLATIVE TAKING CLAIM ON THE PLEADINGS.

Before dismissing Bay View's case on the pleadings, the court below was required to accept all Bay View's allegations as true, to draw all inferences in Bay View's favor, and to dismiss under Rule 12(b)(4) only if it is "beyond doubt that the plaintiff can prove *no* set of facts in support of his claim [that] would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (emphasis added); 2 Moore's Federal Practice, § 12.34 [1][b] (3d ed. 1997). The courts below, though enunciating these standards, did not even come close to following them—standards particularly important when a legislative taking is alleged, which this Court has recognized as necessarily fact intensive. *See Eastern Enterprises*, 524 U.S. at 523; *see also Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

The lower court's out-of-thin-air conclusion that the NOL sales were not related to the timber and mineral sales that generated them is not only patently wrong, it does not give the plaintiff any benefit of the doubt or even refer to the plaintiff's pleadings. It also ignores Judge Kozinski's lucid description of the transactions in *Bay View v. Ahtna*, 105 F.3d 1281 (9th Cir. 1997), which gave birth to this litigation. As Judge Kozinski understood well, it is clear that the Regional Corporations sold their timber and subsurface resources for no reason other than to generate and simultaneously sell the net operating losses. In coordinated transactions, they received a small sum for the timber and a much larger sum for the sale of the tax loss, creating millions of dollars in

resource-generated NOL revenues that were not shared (Comp. at ¶¶ 15-23). As Judge Kozinski explained, the connection was one-to-one:

> [A] native corporation would sell timber valued for tax purposes at $110 for $10. It would then sell the $100 loss to a profitable corporation. The profitable corporation, in turn, would apply the $100 loss against taxable income. If the corporation was in the 34% tax bracket, it would save $34 on each $100 loss it bought. The profitable corporation thus would pay around $30 to the native corporation for the $100 loss.

Bay View, 105 F.3d at 1283 (Kozinski, J.).

That the income from the tax benefit is part of the income from the mineral and timber estates is even clearer when one recalls that ANCSA carefully, not once but twice, provided a favorable tax base to protect the value of the timber and mineral interests, thus linking the two together. *See* 43 U.S.C. § 1620(c) (amended by Act of Dec. 2, 1980, Pub. L. No. 96-487, § 1408, 94 Stat. 2371, 2495-96 (1980)). Thus, tax advantages were part of the "bundle of rights," *see e.g. Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979), that made up the timber and subsurface estates granted to the Regions on the condition that *all* revenues from them would be shared with each other and the villages.

Because the decision below so violates the standards of this Court for dismissing cases on the pleadings, so misinterprets the sharing that is a central part of ANCSA, and so deprives defendants of vested property rights without just compensation, the writ should be granted.

IV. THE COURT OF APPEALS MISCONSTRUED THE PLAIN MEANING OF ANCSA.

Although it was clear error to dismiss the case on the pleadings, the court below attempted to support its conclusion on the plain meaning of the statute. But it totally

misconstrued that plain meaning. The majority opinion ignored the breadth of ANCSA's phrase "*all* revenues received by each Regional Corporation from the timber resources and subsurface estate patented to it," 43 U.S.C. § 1606(i), a phrase no less all-inclusive than the phrase "*any* drug-related criminal activity" construed this Term in *Dep't of Housing & Urban Dev. v. Rucker*, __ U.S. __, 122 S. Ct. 1230, 1232 (2002) (emphasis added in each quotation). As in *Rucker*, ANCSA Section 7(i) reflects "Congress' decision not to impose any qualification in the statute," *id.* at 1233, on the revenues from timber and subsurface estates to be shared with other Native corporations.

Congress knew that the timber and mineral estates were very different in different Regions, and the sharing arrangement was a basic way of equalizing the revenues from such estates so that some Regions and Villages would not be "pockets of poverty" while others thrived. *See* House Hearings at 237. Congress required sharing under Section 7(i) "to distribute more evenly among all Natives the benefits of these disparate land grants." *Chugach Natives, Inc. v. Doyon Ltd.*, 588 F.2d 723, 732 (9th Cir. 1978). The revenues from the sales of NOLs, were *from* sales of these timber and mineral resources. They would not have existed but for the timber and minerals sales, and the timber and minerals were sold specifically to produce the NOLs. In *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465 (1997), this Court rejected artificial separation of actions in a single scheme. To the contrary, the Court unanimously held that the phrase "transactions in foreign currency" includes transactions in options to buy such currency, holding that the normal meaning of "in" is "in regard to." *Id.* at 470-71. Here, the definition is much broader. "All revenues received from" is about as broad a definition as Congress could write to say that *everything* flowing from the timber and mineral sales must be shared.

Moreover, the lower court's leap to its factual conclusion—that there is no relationship between revenues from NOLs and the timber and mineral estates that produced them—is totally contrary to the purpose of ANCSA. By selling mineral and timber assets at less than their value, but reaping huge profits on the sale of the net operating losses thus created, the revenue rich Regional Corporations made a large profit from the sale of timber and mineral resources, and they did not share that profit with the villages. They created pockets of wealth and pockets of poverty. Vast timber resources were clear cut and are gone forever and the Villages were left with virtually nothing. Moreover, because the Regions did not share NOL revenues with each other, some Regional Corporations were left rich, others were left poor, and most villages were left poor. As a consequence, ANCSA's fundamental principle of equality has been defeated.

Perhaps most tellingly, the lower court's reading of the "plain meaning" of Section 7(i) would make the 1995 Amendment "a blank sheet of paper," an interpretation that is a "disingenuous evasion" of the purpose of the statute. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 216 (1995) (warning, in those very words, against interpretations of statutes as without meaning, even to avoid a Constitutional problem). The original ANCSA provision was plain and clear, as was its purpose: sharing of *all* revenues in any way produced from the timber and mineral estates that were so unevenly located. It is irrational to consider the 1995 retroactive amendment, so sought by the Regional Corporations, and enacted by Congress, as not actually changing the law at all. Congress' own action shows that new language

was required to remove NOL revenues from the original sharing mandate. Its deliberate retroactivity took petitioner's property.[5]

If there is a plain meaning to sharing "all revenues . . . from the timber resources and subsurface estate" it is that the sales of NOLs are part of that revenue. If there is no plain meaning to this language, then the case should be remanded for a trial to show the relationship between the NOLs and the timber and subsurface estates. In either event, this Court should grant the petition for a writ of certiorari to correct the dismissal on the pleadings by the court below.

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[5] The majority below also attempts to justify excluding NOL sales from ANCSA's "all revenues" by relying on a fragment of the Conference Report that in no way mentions NOLs. App. A at 6a. But in context the cited passage supports the opposite conclusion. It distinguishes between the payment of settlement money and subsurface revenues, both of which must be shared, and revenues from the Regional Corporations' investments in business activities, which need not be shared:

> Each Regional Corporation must distribute among the Village Corporations in the region not less than 50 percent of its share of the $962,500,000 grant, and 50 percent of all revenues received from the subsurface estate. This provision does not apply to revenues received by the Regional Corporations from their investments in business activities.

Conference Report, 1971 U.S.C.C.A.N. at 2249. The Regional Corporations were expected to invest some of the settlement money in business ventures—such as hotels, manufacturing establishments and the like—and they did so. No one claims that revenues from those investments must be shared. But that is entirely separate from the "subsurface estate and timber" revenues which Congress patented to the Regional Corporation on the express condition that *all revenues* from those estates be shared. The distinction is not between business and non-business—exploiting oil and gas and timber is also a business—but between revenues from mineral and timber estates, no matter how produced, and revenues from investments of cash.

V. THE DECISION OF THE COURT OF APPEALS FUNDAMENTALLY CONFLICTS WITH NINTH CIRCUIT AND ALASKA DISTRICT COURT RULINGS INTERPRETING SECTION 7(i) AND A SIMILAR SHARING STATUTE.

The Ninth Circuit long ago recognized that Section 7(i)'s sharing provision was central to the settlement of Alaska Native land claims:

> Congress did not grant the same amount of land to each Village or Regional Corporation. It realized also that the lands selected by the Corporations would vary greatly in their present and future economic value. In order to distribute more evenly among all Natives the benefits of these disparate land grants, Congress required that 70 percent of all revenues from the development of timber and subsurface resources be distributed among the Regional Corporations.

Chugach Natives, Inc. v. Doyon, Ltd., 588 F.2d 723, 732 (9th Cir. 1979). To achieve this more even distribution, it is necessary that "all revenues" in any way derived from mineral and timber estates be shared, not just some. Otherwise, the unequal distribution of wealth remains. And what must be shared among the Regional Corporations under Section 7(i) must also be shared with the Village Corporations under Section 7(j).

In *Aleut Corp. v. Arctic Slope Regional Corp.*, 410 F. Supp. 1196 ("*Aleut I*") (D. Alaska 1976), the district court ruled that resource income from pre-conveyance transactions in subsurface estates still had to be shared under Section 7(i):

> Given the obvious egalitarian purpose of Section 7(i), the court cannot conceive that Congress intended for tremendous amounts of revenues attributable to the

> subsurface estate to escape the sharing requirement of 7(i) solely for the reason that such revenues are received prior to patent.

Id. at 1200. A contrary ruling, the court noted, would "encourage the resource controlling corporation *to devise all sorts of contractual schemes* for maximizing its present revenues at the expense of its sister corporations." *Id.* (emphasis added). Yet, the majority opinion below countenances precisely such a scheme.

Similarly, in *Aleut Corp. v. Arctic Slope Regional Corp.*, 417 F. Supp. 900, 903 (D. Alaska 1976) ("*Aleut II*"), and *Aleut Corp. v. Arctic Slope Regional Corp.*, 421 F. Supp. 862, 867 (D. Alaska 1976) ("*Aleut III*"), the district court rejected Regional Corporation schemes to cast resource generated revenues as non-monetary, to have them paid to creditors, or to exclude them because no minerals were ultimately discovered. This repeated litigation led to the court-approved stipulation among the Regional Corporations that:

> [A]ll revenues (including money, benefits and *any other thing of value*) received by a [Regional] Corporation that are attributable to, directly related to, *or generated from* the exploration, development, production, lease, sale or *other exploitation* of, or the *disposition of any interest* in, the Corporation's Section 7(i) Resources shall be included in Gross Section 7(i) Revenues.

See supra at 6-7 (emphasis added).

The Ninth Circuit and Alaska district court have thus held that Section 7(i), and Section 7(j), guarantee that revenues from the subsurface estate and timber, *no matter how classified or generated*—whether producing "money" or "benefits" or "any other thing of value"—must be shared. The holding below both ignores and conflicts with those long-established and correct decisions.

We know of only two instances in which Congress required a sharing of mineral or timber resources between two Native entities. One is ANCSA. The other is the Navajo Hopi Land Settlement Act, Pub. L. No. 93-531, 88 Stat. 1712 (1974) (codified as amended at 25 U.S.C. §§ 640d-640d-31). Both Acts affect land within the jurisdiction of the Ninth Circuit, the court that would have decided the Villages' suit against the Regional Corporations except for the retroactive effect of the 1995 amendment. In *Peabody Coal v. Navajo Nation*, 75 F.3d 457 (9th Cir. 1996) (decided by the Ninth Circuit just one year before *Bay View v. Ahtna*), the Ninth Circuit had before it a provision of the Navajo Hopi Land Settlement Act which required a partition of surface ownership but joint ownership of the subsurface estate and provided as to the latter that "the proceeds therefrom shall be divided between the tribes, share and share alike." 25 U.S.C. § 640d-6. The Navajo Nation imposed a tax on the portion of the jointly owned minerals which were under Navajo lands and argued that their tax revenues did not form part of "the proceeds therefrom" of the coal, and thus did not have to be shared with the Hopi Tribe. The Ninth Circuit held to the contrary:

> We hold that the plain meaning of "proceeds" is "all economic benefit derived from the coal," and that the [taxes] are benefits derived from and are entirely related to the coal.

Peabody Coal, 75 F.3d at 469.

The term "all revenues received . . . from the timber resources and subsurface estate" in ANCSA is even broader than the term "proceeds" from the mineral estate at issue in *Peabody Coal*. The decision of the Court of Appeals for the Federal Circuit conflicts with this Ninth Circuit precedent, a particularly important precedent because that very court would have adjudicated the Villages' rights but for Congress' intervention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

No. 00-5097

BAY VIEW, INC.,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Before NEWMAN, LOURIE, and RADER, *Circuit Judges.*

RADER, *Circuit Judge.*

Bay View Inc. appeals the decision of the United States Court of Federal Claims dismissing its complaint. Bay View had complained that the 1995 amendment of the Alaska Native Claims Settlement Act (ANCSA) was a taking, a breach of trust, and a breach of contract. *Bay View, Inc. v. United States,* 46 Fed.Cl. 494 (2000). The Court of Federal Claims dismissed the taking and breach of contract claims for failure to state a claim, and dismissed the breach of trust claim for lack of jurisdiction. *Id.* Because Bay View had no vested property interest in the Regional Corporations' revenue from sales of net operating loss deductions and the ANCSA created neither a trust nor a contractual relationship between the United States and the Alaska natives, this court affirms.

BACKGROUND

The Alaska Native Claims Settlement Act, Pub.L. No. 92-203, 85 Stat. 688 (Dec. 18, 1971), *codified at* 43 U.S.C.

§§ 1601-1629 (1994 & Supp. III 1997), extinguished all claims of aboriginal title in Alaska. ANCSA divided Alaska into twelve geographic regions and established a native-owned Regional Corporation for each. ANCSA also established about 220 Village Corporations, one for each native village entitled to receive land and funds under ANCSA. Then ANCSA gave the Village Corporations the surface estates of about 22 million acres of land. ANCSA gave the Regional Corporations 16 million acres of land in fee as well as the subsurface estates and timber rights for the 22 million acres of the Village Corporations. Bay View is a Village Corporation.

43 U.S.C. § 1606(i) required each Regional Corporation to share with the other Regional Corporations "all revenues received by each Regional Corporation from the timber resources and subsurface estate patented to it pursuant to this Act." Section 1606(j) required each Regional Corporation to share with the Village Corporations in the region a percentage (45% for the first five years and 50% thereafter) of its income from certain sources, including revenues received under § 1606(i).

The tax basis for the land or interests in land, such as timber, was set at the "fair value of such land or interest in land at the time of receipt." 43 U.S.C. § 1620(c) (1994 & Supp. III 1997). Accordingly, the tax basis for the native corporations' (Regional and Village Corporations') assets were set in the early 1970's when they received the assets. The 1984 Deficit Reduction Act (DEFRA) exempted the native corporations from DEFRA's ban on sales of net operating loss (NOL) deductions. When native corporations sold their natural resources in the 1980's, they often incurred operating losses because the value of those resources had decreased between the early 1970's and the 1980's. The native corporations sold these NOLs to profitable private corporations. The private corporations typically paid the

native corporations about $30 for a $100 loss. These sales continued until 1988, when the law changed to forbid further NOL sales by native corporations. See *Technical and Miscellaneous Revenue Act of 1988,* Pub.L. 100-647, § 5021, 102 Stat. 3342, 3666 (1988).

None of the Regional Corporations included the revenues received from NOL sales in revenue sharing distributions. In 1995, Bay View filed a class action suit in the District of Alaska seeking to compel the Regional Corporations to share the NOL proceeds. The district court dismissed the action, holding that the Village Corporations could not enforce the ANCSA provision against the Regional Corporations. *Bay View, Inc. v. Ahtna, Inc.,* Civ. No. 94-551 (D.Alaska, July 7, 1995). While Bay View's appeal to the United States Court of Appeals for the Ninth Circuit was pending in 1995, Congress amended § 1606. This new section (i)(2) expressly states that "revenues" under § 1606 do not include benefits received from "losses incurred" by a Regional Corporation. In other words, the new § 1606(i)(2) clarified that the Regional Corporations do not have to share NOL proceeds. The Ninth Circuit affirmed based on the 1995 amendment, noting that the new § 1606(i)(2) was fully retroactive. *Bay View, Inc. v. AHTNA, Inc.,* 105 F.3d 1281, 1284 (9th Cir.1997).

Bay View then filed an action against the United States in the Court of Federal Claims alleging that the 1995 amendment was a taking, a breach of trust, and a breach of contract. Bay View argued that the 1995 amendment to section 1606(i) of ANCSA was a compensable taking under the Fifth Amendment. Specifically, Bay View contended that it had compensable vested rights in the Regional Corporations' revenue from the NOL sales under the provisions of ANCSA. Bay View considers NOL revenue a shareable asset arising from natural resources under ANCSA.

The Court of Federal Claims held that the amendment was not a taking because the revenues received from NOL sales were not revenues "from the timber resources and subsurface estate." It further held that ANCSA did not create a trust relationship mandating a payment of money for breach of trust. Finally, the Court of Federal Claims held that ANCSA was not a contract or a treaty. Even if ANCSA was a contract or treaty, the trial court reasoned, the United States committed no breach because the Regional Corporations had never had an obligation to share NOL revenues. Accordingly, the Court of Federal Claims dismissed the taking and breach of contract claims for failure to state a claim and dismissed the breach of trust claim for lack of jurisdiction. Bay View timely appealed to this court, which has exclusive appellate jurisdiction. 28 U.S.C. § 1295(a)(3) (1994).

DISCUSSION

This court reviews a dismissal for failure to state a claim without deference. *Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166, 1170 (Fed.Cir.1995). A plaintiff fails to state a claim upon which relief could be granted if the plaintiff cannot assert a set of facts that would support its claim. *Id.* In reviewing the Court of Federal Claims' grant of such a motion, this court assumes that all well-pled factual allegations are true and resolves all reasonable inferences in favor of the nonmovant. *Id.* This court also reviews without deference the Court of Federal Claims grant of a motion to dismiss for lack of jurisdiction. *JCM, Ltd. v. United States,* 210 F.3d 1357, 1359 (Fed.Cir.2000). "Whether a taking compensable under the Fifth Amendment has occurred is a question of law based on factual underpinnings." *Bass Enter. Prod. Co. v. United States,* 133F.3d 893, 895 (Fed.Cir.1998). "In the absence of factual disputes, the question of contract formation is a question of law, reviewable *de novo.*" *Trauma Serv. Group v. United States,* 104 F.3d 1321, 1325 (Fed.Cir.1997).

I.

In a takings analysis, a court first determines whether the plaintiff possesses a valid interest in the property affected by the governmental action, i.e., whether the plaintiff possesses a "stick in the bundle of rights." If a plaintiff possesses a compensable property right, a court proceeds to determine whether the governmental action at issue constitutes a taking of that "stick." *Karuk Tribe of Cal. v. Ammon,* 209 F.3d 1366, 1374 (Fed.Cir.2000) (citing *M & J Coal Co. v. United States,* 47 F.3d 1148, 1154 (Fed.Cir.1995)).

Under ANCSA, a Regional Corporation must share revenue "received . . . *from* the timber resources and subsurface estate patented to it pursuant to this act." 43 U.S.C. § 1606(i)(1994 & Supp. III 1997)(emphasis added). Thus, Bay View's entitlement to compensatory property in this case depends on whether the money received by Regional Corporations from NOL sales was "from" the underlying timber resources within the meaning of the statute.

In a distant sense, the NOL proceeds have some connection to the timber resources. Specifically, the sale of the resources generated NOLs; the subsequent sale of NOLs produced these proceeds. The sale of the NOLs themselves, however, is a separate business transaction without any direct relationship to the tangible resources patented to the Regional Corporations. The Regional Corporation realized revenue from sale of NOLs because they found buyers and successfully negotiated sales of these intangible financial interests. The NOLs only existed in the first place because the Regional Corporations enjoyed a favorable tax status. Accurately characterized, the NOL proceeds are a product of the tax status of the Regional Corporations, not the product of timber resources. Thus, applying the terms of ANCSA, the NOL sales generated revenues from sales of financial interests related to tax status, not from tangible timber or mineral estates.

Stated in other words, private corporations that purchased NOLs from the Regional Corporations did not acquire any interest in timber or subsurface estates. Rather, these private corporations paid for the right to consolidate their tax returns with the Regional Corporations to reduce their own tax liability. Thus, the Court of Federal Claims determined correctly that NOL proceeds do not constitute "revenues . . . from the timber resources and subsurface estate."

Some forms of legislative history supply insights into the meaning of enactments. While statements of a single legislator rarely reflect the will of the entire Congress, a joint statement of a conference committee more often reflects the joint will of each house of Congress. In this case, the Joint Statement of the Committee of Conference for ANCSA discusses the sharing of revenues between the Regional Corporations and the Village Corporations: "This provision does not apply to revenues received by the Regional Corporations from their investment in *business* activities." Conf. Rep. No. 92-746, 92nd Cong. 1st Sess. (1971), 1971 U.S.C.C.A.N. 2247, 2249 (emphasis added). This language suggests that the preposition "from" in § 1606(i) doesnot embrace financial and business revenues beyond those received directly from natural resources.

This statement in the Joint Statement refers to § 1606(j), not § 1606(i). However, § 1606(j) expressly applies to income received "under subsection (i) (revenues *from* the timber resources and subsurface estate patented to it pursuant to this Act)." (Emphasis added.) In this case, the NOL generated revenue for the Regional Corporations based on business dealings with profitable corporations, not directly from the sale of natural resources. Thus, the NOL revenue is not "from" the timber resources and subsurface estates within the meaning of § 1606(i)-(j). Consequently, ANCSA does not support an expansive meaning of "all revenues from" to comprehend "all economic benefit derived" from the natural resources.

In sum, Bay View does not possess a compensable property right in the Regional Corporations' revenue from the NOL sales. Thus, this court need not assess whether the United States took that interest in the 1995 amendment. Accordingly, the 1995 amendment to section 1606(i), exempting NOL revenues from the Act's sharing requirement, did not take private property from Bay View for a public purpose.

II.

In *United States v. Mitchell,* 463 U.S. 206, 226, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983), the Supreme Court held that a plaintiff claiming a breach of fiduciary duty must identify a statute that creates a trust relationship and mandates the payment of money for damages stemming from the breach of that trust relationship. Where statutes "clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained." *Id.* Moreover, if the Government "takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection." *Id.* at 225, 103 S.Ct. 2961.

In considering a claim that the United States breached fiduciary duties by violating the land selection rights under ANCSA, this court has previously stated:

> The text and legislative history of the ANCSA make clear that Congress sought to avoid creating any fiduciary relationship between the United States and any Native organization. *See 43 U.S.C. 1601* (b); S.Rep. No. 92-405, at 108 (1971). Moreover, there is no

> provision of the ANCSA that mandates the payment of money for failure to carry out the provisions of the statute. Accordingly, we agree with the Court of Federal Claims that it lacked jurisdiction over Seldovia's breach of fiduciary duty claims.

Seldovia Native Ass'n v. United States, 144 F.3d 769, 784 (Fed.Cir.1998).

In reaching its decision to dismiss Bay View's complaint for lack of subject matter jurisdiction, the Court of Federal Claims found that Bay View's breach of trust claim did not satisfy the requirements set out by *Mitchell. Bay View,* 46 Fed.Cl. at 498. Indeed the trial court correctly determined that no trust relationship arose between the United States and the Alaska natives because the United States restricted alienation of stock ownership in the native corporations. The actions of the United States did not assert control or supervision over tribal money or property. The United States did not receive, hold, or disburse any revenues received by the native corporations. Thus, the United States has not acted in the capacity of a trustee for the native corporations' revenues or breached any fiduciary duties. Accordingly, as this court previously held in *Seldovia,* ANCSA did not create a trust relationship between the United States and the Alaska natives or any substantive right enforceable against the United States for money damages.

III.

"Any agreement can be a contract within the meaning of the Tucker Act, provided that it meets the requirements for a contract with the Government, specifically: mutual intent to contract including an offer and acceptance, consideration, and a Government representative who had actual authority to bind the Government." *Trauma Serv. Group v. United States,* 104 F.3d 1321, 1326 (Fed.Cir.1997). "An implied-in-fact agreement must be founded upon a meeting of the minds, which,

although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Id.*

In this case, the only alleged contract is ANCSA itself. Because ANCSA does not purport to create an express contract between the United States and Bay View, the record of ANCSA's enactment would have to support an implied contract. Although it extinguished aboriginal title to land and, at the same time, gave the United States some rights to share in resource exploitation, ANCSA does not meet the requirements for a contract. For instance, ANCSA evinces no offer from the Alaska natives accepted by United States with ample consideration to show a contractual agreement. The Alaska natives participated in the legislative process leading up to ANCSA, but nothing in the Act or its enactment history suggests that they made a specific offer to the United States. Nor does the Act or the record show that the United States made a specific defined offer to the natives. Neither alleged contractual party accepted these nonexistent offers. Rather ANCSA, while seeking to "settle" aboriginal claims, was a unilateral act by the United States. Accordingly, ANCSA is not a contract between the United States and the Alaska natives (or native corporations such as Bay View).

CONCLUSION

The Court of Federal Claims correctly determined that Bay View had no vested property interest in the Regional Corporations' revenue from the NOL sales and that the ANCSA created neither a trust nor contractual relationship between the United States and the Alaska natives. Therefore, the trial court did not err in dismissing Bay View's complaint.

COSTS

Each party shall bear its own costs.

AFFIRMED.

PAULINE NEWMAN, *Circuit Judge*, dissenting.

By legislation enacted in 1995, the United States removed from the Alaskan Native Villages their entitlement to share with the Regional Corporations in the full value received for sale of Alaskan Native timber resources. The legislation removed from this statutory sharing obligation the revenues generated by sale of the timber below its initial cost valuation. This targeted legislative removal from the Native Villages of their existing entitlement to share in the revenues already received, attributable to and directly related to the timber resources in transactions long completed, raises a straightforward issue cognizable under the Fifth Amendment. I must, respectfully, dissent from my colleagues' ruling that Bay View did not state a claim on which relief can be granted.

Until 1995, the Alaska Native Claims Settlement Act of 1971 (ANCSA) required sharing of "all revenues received" from the timber and mineral resources of the Native Alaskan lands. ANCSA § 7(i), codified at 43 U.S.C. § 1606(i). As explained in *Aleut Corp. v. Arctic Slope Regional Corp.*, 484 F.Supp. 482, 485 (D.Alaska 1980), "revenues received by a regional corporation that are attributable to, directly related to, or generated by the acquisition of an interest in the corporation's subsurface estate are revenues subject to the sharing provisions of section 7(i)." Many years later, the 1995 Amendment amended Section 7(i) as follows:

> (A) Section 7(i)(2)-for purposes of this subsection, the term "revenue" does not include any benefit received or realized for the use of losses incurred or credits earned by the Regional Corporation.
>
> (B) This amendment shall be effective as of the date of the enactment of the Alaska Native Claims Settlement Act . . . [1971].

We are not concerned here with the effect of the 1995 Amendment on prospective rights of either the Regional Corporations or the Native Villages. However, its explicit retroactivity had a significant effect on rights already accrued and vested, for the sales here at issue were all completed between 1984 and 1988. These were the sales that were targeted by the 1995 enactment.

DISCUSSION

The ANCSA of 1971 is "a comprehensive statute designed to settle all land claims by Alaska Natives." *Alaska v. Native Village of Venetie Tribal Government,* 522 U.S. 520, 523, 118 S.Ct. 948, 140 L.Ed.2d 30 (1998). Although its implementation has not been free of dispute, a foundation principle was that the economic benefits of Native natural resources would be shared equitably among Alaska Natives whose lands were resource-poor as well as those that were rich. *See* 43 U.S.C. § 1602(i); *Chugach Natives, Inc. v. Doyon, Ltd.,* 588 F.2d 723, 732 (9th Cir.1978) ("We agree with the district court that the revenue sharing provision in § 7(i) 'was intended to achieve a rough equality in assets among all the Natives . . . . [The section] insures that all of the Natives will benefit in roughly equal proportions from these assets.' ") (quoting *Aleut Corp. v. Arctic Slope Regional Corp.*, 421 F.Supp. 862, 867 (D.Alaska 1976)).

The Deficit Reduction Act of 1984, terminated in 1988, was specifically designed to permit the Alaska Natives to add value to their timber resources in order to enlarge the economic benefits available from their natural resources. Sale of the tax losses of a timber sale is directly related to the timber sale. Indeed, the record shows that the native timber sales strategy was dominated by this purpose, producing what Bay View calls "fire sales" in 1988 in order to take advantage of this increased value of the timber. As Bay View explains, the sale of the timber and of the losses of the timber sale were

not two entirely different transactions but a single continuing transaction, each causing the occurrence of the other.

Section 1606(i) of 43 U.S.C., as enacted and as it existed until 1995, required that a percentage of "all revenues . . . from the timber resources and subsurface estate" be shared among the regional corporations and with the village corporations. The 1995 Amendment authorized the Regional Corporations to exclude from this obligation the revenues received from sale of the tax losses generated by the timber sales. The Regional Corporations' reluctance to share these revenues entailed sales of timber losses of over $1.5 billion, with a sharing value to the villages of about $425,000,000.

For these sales, already completed and proceeds already realized, the villages' right to their statutory share was fully vested. Legislation that retroactively affects vested rights is "not favored in the law." *Bowen v. Georgetown Univ. Hospital,* 488 U.S. 204, 208, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988). It violates fundamental concepts of justice and fairness, to change the rules after the game is played. In *Eastern Enterprises v. Apfel,* 524 U.S. 498, 529, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998) the Court struck down a statute that "imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience." *See also, e.g., United States v. Security Industrial Bank,* 459 U.S. 70, 73-74, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982) (a bankruptcy avoidance statute is not subject to retroactive application). In this case, with specific retroactive effect on previously vested rights, the consequences thereof are not immune from the Fifth Amendment.

The government stresses that Alaska's Senator Stevens told Congress that the 1995 Amendment was simply a clarification, not a change of law. Bay View points out that there were no hearings, and that it is not reasonable to believe that in 1971 the Native Villages would have readily yielded

their right to share in $1.5 billion in revenue from their timber resources. Nor does it appear even remotely likely that the villages would have agreed in 1971 to the hasty sale of these resources at a severe loss during the 1984-1988 window of the Deficit Reduction Act, unless they would share in the revenues of those sales. *Cf. Peabody Coal Co. v. Navajo Nation,* 75 F.3d 457, 467 (9th Cir.1996) (the requirement that mineral sale "proceeds" be shared between Navajo and Hopi tribes included proceeds of a tax levied by the Navajo on their sale of minerals).

I take note of the government's argument that there were in fact some distributions of tax-loss proceeds among the Native Villages, thus reducing the magnitude of the asserted taking. This aspect relates to quantum, not entitlement, and was not reached by the Court of Federal Claims. Nor do I endorse the court's casual disposition of the trust relationship between the United States and the Alaska Natives, for the ANCSA did not eliminate all fiduciary responsibility of the United States. Before enactment of the 1995 Amendment the Alaskan Native entities were litigating this issue among themselves. The Ninth Circuit, before whom the case was pending at the time of the 1995 Amendment, recognized that any remedy must now come from the Tucker Act, stating in *Bay View, Inc. v. Ahtna, Inc.,* 105 F.3d 1281, 1286 (9th Cir.1997) that "We express no view as to whether appellants had a property right that was destroyed by Congress; that is a question that will have to be answered by the Court of Federal Claims, if appellants choose to bring suit there."

Statute and precedent make quite clear that Bay View had a property right in the full proceeds of the timber sales. The retroactive legislation which deprived Bay View of its share raised a claim cognizable under the Fifth Amendment. From this court's affirmation of the dismissal of that claim, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

No. 99-456L

BAY VIEW, INC., an Alaska
Native Village Corporation,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Opinion and Order

WEINSTEIN, *Judge.*

This case is before the court on defendant's motion to dismiss pursuant to Rule 12(b) of the Rules of the United States Court of Federal Claims (RCFC). Plaintiff alleges[1] that Congress' 1995 amendment of section 1606(i) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § § 1601-1629(f) (1994 & Supp. III 1997)[2] constitutes a taking of plaintiff's property (Count I); a breach of trust (Count II); and a breach of contract (Count III).[3] The court dismisses

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[1] All references to the complaint in this opinion and order are to plaintiff's second amended complaint (Compl.), filed by leave of the court on November 2, 1999.

[2] Unless otherwise noted, section citations are to sections of ANCSA as amended and codified at 43 U.S.C. § § 1601-1629(f) (1994 & Supp. III 1997).

[3] On August 20, 1999, plaintiff moved for class certification pursuant to RCFC 23. The court granted defendant's motion to stay consideration of the motion, holding that a stay pending a ruling on defendant's motion

Count II for lack of subject matter jurisdiction, *see* RCFC 12(b)(1), and Counts I and III for failure to state a claim upon which relief can be granted. *See* RCFC 12(b)(4).

FACTS

ANCSA was enacted into law on December 18, 1971. *See* Pub.L. No. 92-203, 85 Stat. 688. ANCSA completely extinguished all aboriginal title claims to Alaska land, *see* § 1603(b),(c), and transferred to state-chartered private for-profit corporations to be formed by Alaska natives (Native Corporations) $962.5 million in state and federal funds and approximately 44 million acres of Alaska land. *Alaska v. Native Village of Venetie Tribal Gov't,* 522 U.S. 520, 524, 118 S.Ct. 948, 140 L.Ed.2d 30 (1998). Congress required all shareholders in the Native Corporations to be Alaska natives. *Id.*

ANCSA created two types of Native Corporations: "Regional Corporations" and "Village Corporations." Twelve Regional Corporations were formed pursuant to section 1606. Approximately 200 Village Corporations were formed pursuant to section 1607. Plaintiff Bay View, Inc. is a Village Corporation.

The United States allocated among the Village Corporations approximately 22 million acres of surface estate in Alaska land. The underlying subsurface estate of this territory, and both the surface and subsurface estate in an additional 16 million acres, were allocated among the

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to dismiss would serve the need for judicial economy without prejudicing the rights of absent class members. The court's dismissal of plaintiff's complaint renders its motion for class certification moot. *See Greenbrier v. United States,* 193 F.3d 1348, 1360 (Fed.Cir.1999) ("[Plaintiffs] . . . appeal the trial court's order denying the certification of a class . . . . This issue is moot in light of our holdings that the government is not liable to the [plaintiffs] . . . ."). Accordingly, plaintiff's motion for class certification is denied.

Regional Corporations. *See* §§ 1611, 1613; *see also Koniag, Inc. v. Koncor Forest Resource,* 39 F.3d 991, 995 (9th Cir.1994). Each native Alaskan enrolled in one of the twelve regions (pursuant to section 1604) and received stock in the coordinate Regional Corporation (pursuant to section 1606(g)).

ANCSA requires the twelve Regional Corporations to share revenues as follows:

> 70 percent of all revenues received by each Regional Corporation *from the timber resources and subsurface estate patented to it pursuant to this chapter* shall be divided annually by the Regional Corporation among all twelve Regional Corporations organized pursuant to this section according to the number of Natives enrolled in each region pursuant to section 1604 of this title.

§ 1606(i)(1)(A) (emphasis added). The 30% of section 1606(i)(1)(A) revenues that a Regional Corporation keeps, plus its share of section 1606(i)(1)(A) shared revenues, comprise a Regional Corporation's total section 1606(i) revenue.

ANCSA also requires each Regional Corporation to distribute first 45%, then 50%, of its section 1606(i) revenues (and net income) among: (1) the Village Corporations within its region and (2) any Regional Corporation shareholders who are not also residents of a Village (at-large shareholders). *See* § 1606(j).

From 1984 until 1988, Congress, under the Internal Revenue Code, allowed Native Corporations to sell net operating loss (NOL) deductions to for-profit corporations. *See* Deficit Reduction Act, Pub.L. No. 98-369, § 60(b), 98 Stat. 494, 579 (1984) (codified at note following 26 U.S.C. § 1504 (Supp. II 1984)) (providing an exception to § 60(a)); Tax Reform Act of 1986, Pub.L. No. 99-415, § 1804(e)(5), 100 Stat.2085, 2801 (1986) (codified at note following 26 U.S.C. § 1504 (Supp. IV 1986)) (clarifying purpose of

§ 60(b) "to quash Internal Revenue Service resistance to this" exception, *Bay View Inc. v. AHTNA Inc.*, 105 F.3d 1281, 1283 (9th Cir.1997)); Technical & Miscellaneous Revenue Act of 1988, Pub.L. No. 100-647, § 5021, 102 Stat. 3342, 3666 (1988) (codified at note following 26 U.S.C. § 1504 (1988)) (repealing the program created by the 1984 and 1986 Acts).

The tax basis of a Native Corporation's lands is equal to the fair market value of the land at the time of transfer. *See* § 1620(c). When transfer occurred in the late 1970s, commodity prices were at all-time highs, so the lands carried "artificially high tax bases and thus generated huge tax losses when sold in the mid-1980s." *Bay View,* 105 F.3d at 1284 n.2. For example, a Native Corporation might sell timber resources for $10 million, whereas its basis, calculated according to value at the time of transfer, might be $110 million, $100 million more than the sale price. The latter amount could be claimed as an NOL deduction.

The tax program allowed an Alaska Native Corporation to affiliate with a profitable corporation and apply its NOL against the affiliated corporation's taxable income. "If the [profitable] corporation was in the 34% tax bracket, it would save $34 in taxes for each $100 loss it bought. The profitable corporation [then might] pay [approximately] $30 to the Native corporation for the $100 loss." *Bay View,* 105 F.3d at 1283. In this fashion, Alaska Native Corporations sold approximately $1.5 billion in NOL deductions, and generated for themselves about $425 million in NOL revenue. *Id.* at 1284.

In 1990, ten Regional Corporations entered into a mutual assistance agreement not to share their NOL revenues, and to seek an amendment to ANCSA that would exempt the NOL revenues from section 1606(i)'s sharing requirement. *Bay View,* 105 F.3d at 1284; Compl. ¶ 25. Plaintiff sued in Federal District Court for a share of the unshared NOL

revenues. *Bay View,* 105 F.3d at 1284. The district court dismissed for failure to state a claim upon which relief could be granted, because ANCSA did not give plaintiff an implied right of action to enforce section 1606(i) sharing against the Regional Corporations. *See Bayview, Inc. v. AHTNA, Inc.,* No. A94-0551 CV (D.Alaska July 7, 1995); *Bay View,* 105 F.3d at 1284, 1286; *see also Oliver v. Sealaska Corp.,* 192 F.3d 1220, 1223-25 (9th Cir.1999) (ANCSA gave at-large shareholder no express or implied private right of action to enforce sharing among the Regional Corporations).

On November 2, 1995, while the case was on appeal to the Ninth Circuit, an amendment to section 1606(i) was signed into law, adding paragraph (2), which provides:

> For purposes of this subsection, the term "revenues" does not include any benefit received or realized for the use of losses incurred or credits earned by a Regional Corporation.

See Pub.L. No. 104-42, § 109, 109 Stat. 353, 357 (codified at § 1606(i)(2)). The Ninth Circuit affirmed the district court, holding that Congress had taken away whatever rights plaintiff might have had to share in the NOL revenues, but expressing "no view as to whether [Bay View] had a property right that was destroyed by Congress; that is a question that will have to be answered by the Court of Federal Claims, if appellants choose to bring suit there." *Bay View,* 105 F.3d at 1286. [4]

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[4] The Ninth Circuit Court of Appeals' conclusion that plaintiff is "clearly . . . entitled to bring a Tucker Act claim because Congress did not explicitly preclude such suits when it enacted ANCSA," *Bay View,* 105 F.3d at 1285, mistakes the basis for this court's subject matter jurisdiction. Lack of explicit statutory preclusion of suit alone does not establish subject matter jurisdiction. Rather, the test is whether the requirements of the Tucker Act are satisfied.

DISCUSSION

Standard of Review

All federal courts are courts of limited jurisdiction, and the court must consider its jurisdiction before it considers the merits of a claim. *See Owen Equip. & Erection Co. v. Kroger,* 437 U.S. 365, 374, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978). The jurisdiction of the United States Court of Federal Claims is limited "to the metes and bounds of the United States' consent to be sued in its waiver of [sovereign] immunity." *RHI Holdings, Inc. v. United States,* 142 F.3d 1459, 1461 (Fed.Cir.1998) (citing *United States v. Sherwood,* 312 U.S. 584, 586, 61 S.Ct. 767, 85 L.Ed. 1058 (1941)). In evaluating a motion to dismiss, the court construes all allegations in favor of the non-moving party. *See Scheuer v. Rhodes*, 416 U.S. 232, 236, 94S.Ct. 1683, 40 L.Ed.2d 90 (1974). The ultimate burden of establishing jurisdiction rests on plaintiff. *See Rocovich v. United States,* 933 F.2d 991, 993 (Fed.Cir.1991).

The Court of Federal Claims has jurisdiction over claims that fall within the terms of the Tucker Act, 28 U.S.C. § 1491 (1994 & Supp. III 1997) (Tucker Act), and its counterpart for claims brought by Indian tribes, 28 U.S.C. § 1505 (1994) (Indian Tucker Act). *See United States v. Mitchell,* 463 U.S. 206, 215-16, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983). However, neither jurisdiction-granting act "create[s] any substantive right enforceable against the United States for money damages." *Id.* at 216, 103 S.Ct. 2961 (internal quotations omitted). Accordingly, "the claimant must demonstrate that the source of substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.' " *Id.* at 216-17, 103 S.Ct. 2961 (quoting *United States v. Testan,* 424 U.S. 392, 400, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976)).

The court may dismiss a complaint pursuant to RCFC 12(b)(4) for failure to state a claim upon which relief may be

granted "where the plaintiff can prove no set of facts that would support its claim." *New York Life Ins. Co. v. United States,* 190 F.3d 1372, 1377 (Fed.Cir.1999); *see also Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); RCFC 12(b)(4). Because granting a 12(b)(4) motion to dismiss "summarily terminates the case on its merits," the court "must accept the plaintiff's factual allegations in the complaint as true, drawing all inferences in favor of the plaintiff." *Ponder v. United States,* 117 F.3d 549, 552-53 (Fed.Cir.1997).

Count I: Taking

"A taking compensable under the Fifth Amendment inherently requires the existence of 'private property.' As part of a takings case, the plaintiff must show a legally-cognizable property interest." *Skip Kirchdorfer, Inc. v. United States,* 6 F.3d 1573, 1580 (Fed.Cir.1993) (citing *United States ex rel. Tennessee Valley Auth. v. Powelson,* 319 U.S. 266, 281, 63 S.Ct. 1047, 87 L.Ed. 1390 (1943)); *see also Northern Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649, 96 S.Ct. 1793, 48 L.Ed.2d 274 (1976) (holding that Congress could amend an Indian allotment act without paying compensation for a taking because the allotment act had not granted plaintiffs a vested property interest).

The court concludes, on the basis of section 1606(i)'s plain language, that NOL revenues were not shareable revenues under section 1606(i) as enacted. Legislative history and prior judicial interpretations of shareable revenues confirm this interpretation. Accordingly, plaintiff had no property interest in the NOL revenues, and Congress took nothing when it enacted the 1995 amendment clarifying that NOL revenues were not shareable revenues. Thus, plaintiff fails to state a claim upon which relief can be granted. The reasoning behind this conclusion follows.

Under ANCSA, a Regional Corporation's revenue is shareable if "received . . . from the timber resources and subsurface estate patented to it pursuant to this chapter." § 1606(i). By its plain language, only revenues received by a Regional Corporation "from" the timber resources and subsurface estate are shareable. As a corollary, revenues received by a Regional Corporation that are not "from" the timber resources and subsurface estate patented to it are not shareable.

The legislative history of the section 1606(i) sharing requirement confirms this interpretation. *See, e.g., Delverde, SrL v. United States,* 202 F.3d 1360, 1366-67 (Fed.Cir.2000) (considering legislative history that confirmed a statute's plain meaning). Congress included section 1606(i) "to distribute more evenly among all Natives the benefits of" the disparate land grants made to each Village and Regional Corporation. *Chugach Natives, Inc. v. Doyon, Ltd.,* 588 F.2d 723, 731 (9th Cir.1979) (discussing Congressional intent found in section 1601(a),(b) and ANCSA's legislative history). However, the legislative history makes clear that the sharing provision does "not apply to revenues received by the Regional Corporations from their investment in business activities." Conf. Rep. No. 92-746, 92th Cong., 1st Sess (1971), reprinted in 1971 U.S.C.C.A.N. 2247, 2249. Therefore, once timber resources or subsurface estate were sold and the revenues shared, Congress did not intend that revenues received by a Regional Corporation from subsequent business activities be shared.

This interpretation is consistent with other judicial interpretations of shareable revenue under section 1606(i).

> [R]evenues received by a Regional corporation that are attributable to, directly related to, or generated by the

> acquisition of an interest in the corporation's subsurface estate are revenues subject to the sharing provisions of section [1606(i)].

Aleut Corp. v. Arctic Slope Regional Corp., 484 F.Supp. 482, 485 (D.Alaska 1980). Revenues are shareable if they are received by a Regional Corporation from another that acquires an interest in the Regional Corporation's subsurface estate (or timber resources). Other revenues are not shareable under section 1606(i).

NOLs were generated by Regional Corporations when they entered into business transactions that conveyed an interest in timber resources or subsurface estate to another corporation at below the adjusted tax basis of the conveyed resources. The "complicated transaction[s] with [profitable corporations] in accord with the applicable IRS requirements," Compl. ¶ 15, which turned the NOLs into revenue sources, conveyed no interest in the Regional Corporation's timber resources or subsurface estate. They are separate transactions. Again, the revenue generated is not "from" conveyance of an interest in the Regional Corporation's timber resources or subsurface estate, but, rather, the result of the Regional Corporation's investment in business activities with a profitable corporation.

Because NOL proceeds are not revenues "from" conveyance of an interest in timber resources or subsurface estate, they never were subject to section 1606(i)'s sharing requirement. Accordingly, (1) plaintiff had no property interest pursuant to section 1606(i) in the NOL proceeds of the Regional Corporations; (2) Congress took nothing by enacting the 1995 clarifying amendment adding section 1606(i)(2); and (3) plaintiff's taking claim based on sections 1606(i) and 1606(j) fails to state a claim upon which relief can be granted. *See Skip Kirchdorfer,* 6 F.3d at 1580 (a legally cognizable property interest is a necessary part of a takings claim).

Count II: Breach of Trust

Plaintiff alleges that Congress breached its fiduciary duty to plaintiff by amending section 1606(i) in 1995.

The United States Government has a "general trust relationship" with native Americans. *Mitchell,* 463 U.S. at 225, 103 S.Ct. 2961. However, this court's jurisdiction over a claim of government breach of trust requires "a statute that creates a trust relationship and mandates the payment of money for damages stemming from the breach of that trust relationship." *Seldovia Native Assoc., Inc. v. United States,* 144 F.3d 769, 784 (Fed.Cir.1998). In the absence of a provision that expressly creates liability for breach, a statute creating a trust is money-mandating only when it "clearly establish[es] fiduciary obligations of the Government in the management and operation of the Indian lands and resources . . . ." *Mitchell,* 463 U.S. at 226, 103 S.Ct. 2961. Plaintiff cites no such provision.

"[A] fiduciary relationship necessarily arises when the Government assumes . . . elaborate control over . . . property belonging to Indians." *Id.* at 225, 103 S.Ct. 2961. ANCSA is devoid of language creating such a relationship.

This court's and the Federal Circuit's interpretation of ANCSA is confirmed by its legislative history. "The text and legislative history of ANCSA make clear that Congress sought to *avoid* creating any fiduciary relationship between the United States and any Native organization." *Seldovia,* 144 F.3d at 784 (emphasis added).

ANCSA thus is not a money-mandating statute. *Id.* Accordingly, any breach of trust claim based on ANCSA is not within this court's jurisdiction. *See United States v. Mitchell,* 445 U.S. 535, 546, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980) (holding that there is no Tucker Act or Indian Tucker Act jurisdiction when the statute creating the trust does not create a fiduciary management responsibility because such a statute is not money-mandating).

Count III: Breach of Contract/Treaty

Plaintiff alleges that ANCSA embodies the terms of an implied contract or treaty by which Congress extinguished aboriginal title to land and waters in exchange for, among other things, the right to share in resource exploitation. Plaintiff claims that defendant breached this contract or treaty by unilaterally altering ANCSA's terms. These allegations fail to state a claim upon which relief can be granted.

This court has jurisdiction under the Tucker Act when a plaintiff makes "a non-frivolous assertion of [a] . . . contract with the United States." *City of Cincinnati v. United States,* 153 F.3d 1375, 1377 (Fed.Cir.1998). In order to state a claim upon which relief can be granted, however, the complaint must allege a relationship based upon " 'mutual intent to contract including an offer and acceptance, consideration, and a Government representative who had actual authority to bind the Government.' " *Massie v. United States,* 166 F.3d 1184, 1188 (Fed.Cir.1999) (quoting *Trauma Serv. Group v. United States,* 104 F.3d 1321, 1326 (Fed.Cir.1997)).

ANCSA clearly is a statute, not a contract. ANCSA is "a comprehensive statute designed to settle all land claims by Alaska Natives." *Native Village of Venetie Tribal Gov't,* 522 U.S. at 523, 118 S.Ct. 948. Congress did not "offer" to settle native Alaskans' land claims, nor was their "acceptance" required; rather, Congress unilaterally extinguished "all aboriginal titles," § 1603(b), and "[a]ll claims against the United States . . . based on claims of aboriginal right, title, use, or occupancy." § 1603(c).

Although Congress granted Alaska natives money and land at the same time that it extinguished aboriginal titles and claims, the extinguishment could not constitute consideration because the native Alaskans' aboriginal titles and claims created " 'no right against taking or extinction by the United States protected by the Fifth Amendment or any other

principle of law.' " *Inupiat Community,* 680 F.2d at 128 (quoting *Tee-Hit-Ton Indians v. United States,* 348 U.S. 272, 285, 75 S.Ct. 313, 99 L.Ed. 314 (1955)). Nor is ANCSA a settlement agreement of a specific dispute that could be a contract within the meaning of the Tucker Act. *See Angle v. United States,* 709 F.2d 570, 573 (9th Cir.1983). ANCSA also does not direct or authorize any part of the executive branch to enter into a contract with native Alaskans. *Cf. Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't,* 194 F.3d 1374, 1376 (Fed.Cir.1999). Authority to contract is a prerequisite for any contract sued upon in this court. *See Massie,* 166 F.3d at 1188; *Trauma Serv.,* 104 F.3d at 1326.

This court enjoys jurisdiction over claims of breach of a treaty. *See* 28 U.S.C. § 1491(a); 28 U.S.C. § 1505 ("The United States Court of Federal Claims shall have jurisdiction of any claim against the United States . . . whenever such claim is one arising under the . . . treaties of the United States."). ANCSA, however, is not a treaty. It literally could not be a treaty, since, in 1871, *see* Act of Mar. 3, 1871, 16 Stat. 554, 566 (codified as amended at 24 U.S.C. § 71 (1994)), Congress "abrogated the contract-by-treaty method of dealing with Indian tribes." *Antoine v. Washington,* 420 U.S. 194, 201-02, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975). Plaintiff does not even allege that ANCSA was an act of Congress "legislating the ratification of contracts of the Executive Branch with Indian tribes" that have substituted for treaties since that time. *Id.* at 203, 95 S.Ct. 944.

Because ANCSA is neither a money-mandating contract nor a ratified or enforceable treaty, plaintiff can prove no set of facts that would support its breach of contract/treaty claims. Accordingly, they fail to state a claim upon which relief can be granted. *New York Life,* 190 F.3d at 1377.

In its opposition to defendant's motion to dismiss, plaintiff appears to regard its breach of contract/treaty claim as another takings claim. However, again, because ANCSA is

neither a contract nor a treaty, it created no contractual property interest that could be taken by Congress' 1995 amendment of ANCSA. *See United States v. Jim,* 409 U.S. 80, 81-83, 93 S.Ct. 261, 34 L.Ed.2d 282 (1972) (non-contractual statute allotting benefits of mineral deposits among Indians could be amended without being a taking).

Moreover, even if ANCSA were a contract or a treaty, this court's determination that section 1606(i) never required sharing of NOL revenues necessarily disposes of plaintiff's contract and treaty-based takings claims. Because section 1606(i) did not require sharing, Congress' 1995 amendment clarifying section 1606(i) by adding subsection 1606(i)(2) did not alter plaintiff's rights.

CONCLUSION

Count I of plaintiff's complaint is dismissed for failure to state a claim upon which relief can be granted, because plaintiff had no property interest in Regional Corporations' NOL revenues pursuant to sections 1606(i) and (j) as enacted. Count II of plaintiff's complaint is dismissed for lack of jurisdiction, because ANCSA is not a money-mandating statute. Count III of plaintiff's complaint is dismissed for failure to state a claim upon which relief can be granted, because ANCSA was neither a contract nor a treaty, and because no contract or treaty rights, if any, were taken. Defendant's motion to dismiss is granted.

APPENDIX C

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

No. 00-5097

BAY VIEW, INC.,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

DECIDED: March 25, 2002.

ON COMBINED PETITION FOR PANEL REHEARING AND REHEARING EN BANC

ORDER

A combined petition for panel rehearing and rehearing en banc having been filed by the Appellant, and a response thereto having been invited by the court and filed by the Appellee, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service, and authorized to request a poll whether to rehear the appeal *en banc*,

A poll having been requested, taken, and failed,

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The petition for rehearing is denied.

(2) The petition for rehearing en banc is denied.

(3) The mandate of the court will issue on April 1, 2002.

Circuit Judge GAJARSA, with whom Circuit Judge NEWMAN, Circuit Judge CLEVENGER, and Circuit LINN join, dissents from the denial of the petition for rehearing *en banc*.

GAJARSA, Circuit Judge, with whom NEWMAN, CLEVENGER, and LINN, Circuit Judges, join, dissenting from the denial of the petition for rehearing en banc.

In *Bay View, Inc. v. United States*, 278 F.3d 1259 (Fed.Cir.2001) ("*Bay View*"), a divided panel of this court affirmed the decision of the Court of Federal Claims dismissing Bay View's complaint for failure to state a claim upon which relief may be granted. The panel majority determined that Bay View had no vested property interest on which to predicate its taking claim. *Id.* at 1262. Judge Newman dissented. *Id.* at 1266-68. Because Judge Newman was correct that Bay View had a vested property interest and that its complaint therefore raised "a straightforward issue cognizable under the Fifth Amendment," *id.* at 1266, and because of the gravity of the error associated with the panel majority's conclusion to the contrary, this court should have granted the petition for rehearing *en banc*. The failure to do so compounds the error committed by the majority. For the reasons stated below, we must respectfully dissent from this court's failure to grant the petition.

Bay View's complaint alleged that a 1995 amendment to the Alaska Native Claims Settlement Act ("ANCSA"), among other things, effected a taking under the Fifth Amendment. Congress enacted the ANCSA in 1971 to eradicate the cloud on title to land ownership in Alaska posed by claims of aboriginal title. *See* H.R. Rep. 92-523, *reprinted in,* 1971 U.S.C.C.A.N. 2192, 2193 (stating that the purpose "is to provide an equitable solution to the claims made by the Natives of Alaska through a combination grant of land and money"). To this end, the ANCSA extinguished all claims of aboriginal title in Alaska in exchange for granting ownership

of certain interests in land to twelve native-owned Regional Corporations [1] and to approximately 220 smaller, native-owned Village Corporations. *Bay View*, 278 F.3d at 1262; *see also* H.R. Rep. 92-532, *reprinted in*, 1971 U.S.C.C.A.N. 2192, 2194 (stating that judicial settlement of claims to aboriginal title would "take many years, would involve great administrative expense, and would involve a Federal liability of an undeterminable amount," that therefore a legislative settlement "is the only practical course to follow," and that enactment of the ANCSA "would provide this legislative settlement").

The ANCSA gave the Village Corporations surface estates in approximately 22 million acres of land, and gave the Regional Corporations 16 million acres of land in fee as well as the subsurface estates and timber rights for the 22 million acres in which the Village Corporations received surface rights. *Bay View*, 278 F.3d at 1262. Bay View is one of these Village Corporations. *Id.* Although the ANCSA gave the Regional Corporations the timber rights in those 22 million acres, it also required the Regional Corporations to share with each other a percent of "all revenues received by each Regional Corporation *from the timber resources* and subsurface estate patented to it pursuant to this chapter," 43 U.S.C. § 1606(i). Section 1606(j) then required each Regional Corporation to share with the Village Corporations in its region a percentage of its income from certain sources, including revenues received under § 1606(i). *Bay View*, 278 F.3d at 1262; *see also Bay View, Inc. v. Ahtna, Inc.*, 105 F.3d 1281, 1283 (9th Cir.1997) ("[E]ach Regional Corporation must distribute 50% of the 'shared revenue' to its assigned Village Corporations and at-large shareholders.") (citing

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[1] Originally, the ANCSA established only twelve Regional Corporations. A thirteenth Regional Corporation, however, was subsequently established to represent those Alaskan Natives living in the lower forty-eight States, *see* 43 U.S.C. § 1606(c).

§ 1606(j)) ("*Ahtna*"); H.R. Rep. 92-523, *reprinted in* 1971 U.S.C.C.A.N. 2192, 2198-99 (stating that the bill intends "to avoid the creation of one or more giant corporate entities . . . that might become in effect the third level of government" in Alaska, and that "[a]lthough twelve regional corporations are contemplated, *a substantial portion of the funds received by them must be passed on to the village level*") (emphasis added).[2]

In order to provide a value from which the "shared revenue" could be determined, Congress set the tax basis for the land at its estimated fair value at the time of receipt, and set the basis for land interests attributable to an interest in a block of timber at its fair value at the time of first commercial development. *See* 43 U.S.C. § 1620(c) (1994 & Supp. III 1997). This value was set in the early 1970's. Due to various economic factors, when much of the timber was sold in the 1980's, the Regional Corporations incurred losses. These losses represented the difference between the fair value of the timber rights and the value the Regional Corporations realized when the timber was sold.[3] These losses were reported as accounting losses realized directly from the timber sales, permitting many of the Regional Corporations to report net operating losses ("NOLs") for tax purposes.

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[2] The sharing requirement is now 70 percent. *See* 43 U.S.C. § 1606(i)(1) (1994 & Supp. V 1999).

[3] The losses were derived artificially because of the tax basis established by Congress. *Cf.* 132 Cong. Rec. 14943 (statement of Sen. Stevens, June 23, 1986) (explaining that for accounting purposes Native Corporations cannot carry on their books many of the assets received under the ANCSA "because it is virtually impossible to make a solid estimate of the value of these assets" under generally accepted accounting principles, but noting that Native Corporations "are entitled to recognize a cost basis for tax purposes" pursuant to the legislation). Had Congress set the tax basis at zero, for instance, there would have been no loss from the sale of the timber rights, and any and all proceeds would have been profits from which the "shared revenue" would derive.

These accounting losses were particularly valuable assets, because, between 1984 and 1988, Alaskan Native Corporations were specifically exempt by statute from the normal Internal Revenue Service restrictions on the sale of net operating losses. Thus, by a specific act of Congress intended to benefit the Alaskan natives, the Regional Corporations were able to sell the net operating losses to profitable companies including Campbell Soup and the Marriott Corporation, thereby converting these accounting losses obtained from the timber sales to a net gain. *Cf. Ahtna*, 105 F.3d at 1284 (calling this device "a discreet way to give the Alaskan natives a subsidy without having to list it as a budget item" (citing 132 Cong. Rec. S8175-76 (daily ed. June 23, 1986) (statement of Sen. Stevens))). The Regional Corporations typically received about $30 for a $100 loss, and, in the end, sold approximately $1.5 billion in losses, converting them into millions of dollars of profitable revenue.

The Village Corporations sought to obtain their revenue share from the sale of the NOLs, but the Regional Corporations refused. As the Ninth Circuit explained:

> Although section 7(i) of ANCSA requires sharing of resource-based revenue among the Regional Corporations, 43 U.S.C. § 1606(i), ten of the Regional Corporations agreed not to share NOL revenue as part of a Mutual Assistance Agreement (MAA). This cut out village corporations and at-large shareholders whose Regional Corporations were unable to get in on the bounty.

Ahtna, 105 F.3d at 1284 (footnote omitted, noting that the Regional Corporations contended that NOL revenues were not sharable under section 7(i) because they were from tax law not timber).

Bay View filed a class action on behalf of the Village Corporations, which the United States District Court for the

District of Alaska dismissed. *Id.* On appeal, the Ninth Circuit affirmed the dismissal on the grounds that an intervening amendment to the ANCSA "wiped out any claim appellants might have had to shared NOL revenue." *Id.* (citing Pub. L. No. 104-42, § 109, 109 Stat. 353, 357 (1995) (codified at 43 U.S.C. § 1606(i)(2)) ("For purposes of this subsection, the term 'revenues' does not include any benefit received or realized for the use of losses incurred or credits earned by a Regional Corporation."')). Congress made this amendment fully retroactive, thereby taking away from the Village Corporations, by unilateral Congressional action, their right to share in this revenue. *Id.* The Ninth Circuit also held that it lacked jurisdiction to address the merits of Bay View's taking claim because the appellants were entitled to bring that claim before the Court of Federal Claims, pursuant to the Tucker Act. *Id.* at 1285.

Bay View then brought this suit in the Court of Federal Claims. Bay View complained that the 1995 amendment changed the law and took away a vested property right, and that it was therefore entitled to just compensation pursuant to the Fifth Amendment. The panel majority affirmed the Court of Federal Claims' determination that Bay View failed to state a claim because the Village Corporations never had a property interest in a portion of the proceeds from the sale of NOLs generated by the timber sales. *Bay View*, 278 F.3d at 1266. It so concluded because it held that the Village Corporations had a right only to revenue "*from* the timber resources" under §§ 1606(i) and (j). *Id.* at 1263-64. Proceeds from the sale of NOLs, it held, were a separate business transaction; they were not from the sale of timber resources within the meaning of the statute because they were "not *directly* from the sale of natural resources." *Id.* at 1264 (emphasis added).

This conclusion fails to comprehend that the NOLs are in fact revenues derived from the timber sales. This failure is

grave error. The net operating losses represented the negative asset value of the timber after it was sold at less than the tax basis established by Congress. It is true that Congress may not have intended to confer upon the Village Corporations a right to share in all other future business income; however, this was limited to revenue the Regional Corporations generated by investing the portion of residual timber sale proceeds they were entitled to keep (rather than required to share) in subsequent business transactions. In contrast, "[s]tatute and precedent make quite clear that Bay View had a property right in the *full proceeds* of the timber sales," *id.* (Newman, J., dissenting) (emphasis added), in the first instance. Hypothetically, if the Regional Corporations had structured the timber sales such that they sold timber rights in exchange for stock in a corporation, and then sold that stock for cash in a subsequent transaction, surely the Regional Corporations could not escape their statutory obligation to share the timber sale proceeds by virtue of that "indirectness." If the stock were subsequently sold at a loss, the result would be the same. Substituting "NOLs" for "stock," that is precisely what happened in this case. Either way, the intervening paper transaction fails in principle to sever the connection between the revenue received and the value of the timber.

The sale of the net operating losses was not a subsequent business transaction that increased the value of timber proceeds above and beyond a portion that the Regional Corporations had already shared. It was the realization of revenue in exchange for the negative asset value of the timber. This accounting loss was the timber value that the Regional Corporations had yet to share. Had the Regional Corporations sold the timber for a *profit,* they would unquestionably have been obligated to share that profit, and, moreover, that profit would have been calculated based upon the Regional Corporations' statutory tax basis in the timber. The tax basis is only a reference point determinative of the

fair value of the timber transferred pursuant to the ANCSA. The tax basis caused the Regional Corporations to account for a tax loss in the sale of the timber rather than a profit, which tax loss is the operating loss gainfully sold by the Regional Corporations. This tax loss is an asset derived directly from the timber sale, which was monetized by its sale to profitable corporations. It was a property interest derived from the sale of timber that the Regional Corporations were required to share with the Village Corporations.

That the sale of NOLs incurred from timber sales generated "revenue [ ] received . . . from the timber resources," 43 U.S.C. § 1606(j), prior to the 1995 amendment is underscored by the substance of the amendment itself. Notably, the new subsection created by that amendment in 1995, § 1606(i)(2), does not exclude NOL proceeds from the sharing requirement on the grounds that revenue generated from such proceeds fails to constitute revenue generated *from,* or directly from, the timber resources. Rather, the amended subsection excludes NOL proceeds from the definition of "revenue" entirely. *See* 43 U.S.C. § 1606(i)(2) (Supp. V 1999) ("For purposes of this subsection, the term 'revenues' does not include any benefit received or realized for the use of losses incurred or credits earned by a Regional Corporation."). Prior to that amendment, no provision of the ANCSA specifically defined the term "revenue." It must therefore have been construed according to its plain meaning, *viz.* the return, yield, or profit from an income source. *See* XIII *The Oxford English Dictionary* 815-16 (2d ed. 1989) (defining revenue as, *inter alia,* "[t]hat which comes in to one as a return from property or possessions . . . income from any source (but esp. when large and not directly earned)"). Prior to their specific exclusion from the definition, proceeds from the sale of NOLs fell within the plain meaning of the term "revenue." Those NOLs incurred from timber sales, when sold, therefore generated revenue from the timber resources; there is simply no other resource from which they could be

said to originate. This alteration to the definition of "revenue" cannot properly be deemed mere clarification of the law. It altered the plain meaning of "revenue," and, in doing so, it eviscerated the sharing requirement previously applicable to the proceeds of the sale of NOLs incurred from the sale of timber.

Prior to the 1995 amendment to the ANCSA, in exchange for extinguishing Native aboriginal title claims in Alaska, Congress gave Bay View a vested property right to a portion of the full fair value of the timber—to "*all revenues* received by each Regional Corporation *from the timber resources.*" 43 U.S.C. § 1606(i) (1994) (emphasis added). Congress retroactively revoked that right. As a result, Bay View has a cognizable Fifth Amendment claim. That claim should have been heard on the merits, not dismissed on the pleadings. For these reasons, we respectfully dissent.